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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1239

UNITED BISCUIT COMPANY OF AMERICA, PETITIONER

v.

W. WILLARD WIRTZ, SECRETARY OF LABOR, AND JOSEPH CAMPBELL, COMPTROLLER GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 26) is unreported. The findings of fact and conclusions of law of the district court (Pet. App. 39) are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 19, 1965, and a timely petition for

rehearing denied on January 20, 1966. The petition for a writ of certiorari was filed on April 20, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the "Purchase Notice Agreement" under which petitioner supplied military commissaries was a "contract * * * for the * * * furnishing of * * * supplies * * * in any amount exceeding $10,000" within the meaning of the Walsh-Healey Act, when, though the agreement did not obligate the government to make any purchases, actual purchases were expected to—and did—far exceed $10,000.

2. Whether petitioner is excused from compliance with the Walsh-Healey Act on the ground that it had no notice that the Act was applicable.

STATUTE AND CONTRACTUAL PROVISION INVOLVED

Section 1 of the Walsh-Healey Public Contracts Act, 49 Stat. 2036, as amended, 41 U.S.C. 35, provides in relevant part:

> In any contract made and entered into by any executive department * * * of the United States * * * for the manufacture or furnishing of * * * supplies * * * in any amount exceeding $10,000, there shall be included the following representations and stipulations: * * *

Paragraph 17 ("GENERAL PROVISIONS (Supply Contract)") of Standard Form 32 prescribed by the General Services Administration provides (J.A. 42):

17. WALSH-HEALEY PUBLIC CONTRACTS ACT

If this contract is for the manufacture or furnishing of materials, supplies, articles, or equipment in an amount which exceeds or may exceed $10,000 and is otherwise subject to the Walsh-Healey Public Contracts Act as amended (41 U.S. Code 35-45), there are hereby incorporated by reference all representations and stipulations required by said Act and regulations issued thereunder by the Secretary of Labor, such representations and stipulations being subject to all applicable rulings and interpretations of the Secretary of Labor which are now or may hereafter be in effect.

STATEMENT

This action challenges a determination by the Secretary of Labor that petitioner, a manufacturer of cookies and crackers, violated the Walsh-Healey Act by failing to pay certain of its employees time-and-a-half for hours worked in excess of eight hours a day or forty hours a week. The principal issue is whether the agreement between petitioner and the government under which these employees worked is covered by the Walsh-Healey Act.

The agreement, signed in 1957, was entitled "Purchase Notice Agreement" (J.A. 14-47). Under it petitioner provided the Military Subsistence Supply Agency with a list of its products, and agreed to sell such quantities of the listed products at the listed prices as the government might order (J.A. 15 para. 1, 17 para. 6) and to give the government the advantage of any lower price offered any other pur-

chaser (J.A. 19 para. 10). The Agency in return agreed to publish and distribute a Supply Bulletin containing petitioner's product list (J.A. 17 para. 4).[1] It also agreed that all purchases of items listed under the Agreement, when made by Army commissaries in the continental United States, would be made under the Agreement (*i.e.*, rather than through middlemen) (J.A. 15-16 para. 3), but reserved the right not to make any purchases (J.A. 17 para. 6).

Standard Form 32 was attached to and made a part of the Agreement. This form includes (para. 17) "GENERAL PROVISIONS (Supply Contract)" routinely inserted in government supply contracts, including provisions concerning assignment of claims, default, eight-hour law, non-discrimination in employment, and the Walsh-Healey Act (J.A. 29-43). The Walsh-Healey Act provisions stated, "If this contract is for the manufacture or furnishing of * * * supplies * * * in an amount which exceeds or may exceed $10,000," the provisions and stipulations required by that Act would be deemed incorporated in the contract (J.A. 42; *supra*, p. 3).

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[1] The Supply Bulletin distributed pursuant to the Agreement listed some 175 items which could be purchased under the Agreement (J.A. 168-78). Twelve divisions of petitioner to which orders under the Agreement could be sent were listed, with locations ranging from Denver, Salt Lake City and Sioux Falls, to Cincinnati and Philadelphia (J.A. 166-67). Twelve "zones of delivery" were established by the Bulletin, each zone being allocated to a separate division of petitioner for purposes of receiving and filling purchase orders (J.A. 167-68). All purchases of petitioner's products under the Agreement were made at the prices listed in the Supply Bulletin (J.A. 157-62, 164).

In January 1960, the Under Secretary of Labor filed an administrative complaint alleging that petitioner caused its employees engaged in the performance of the Agreement to work in excess of eight hours a day, without paying overtime (J.A. 50-52). Although the Agreement covered military installations both in this country and abroad, the hearing was limited to commissary purchases in the Norfolk, Virginia area. It was stipulated that during the 27-month period covered by the record, sales to commissaries in this area under the Agreement amounted to $253,472.34 (J.A. 154, 229), although no single order exceeded $10,000. The hearing examiner found that the Agreement was subject to the Act, and ordered the payment of $3,657.87 in unpaid overtime. The Wage and Hour Administrator and the Secretary of Labor sustained his decision. The district court also upheld the administrative determination that the Purchase Notice Agreement fell within the Walsh-Healey Act (Pet. App. 39-43), and the Court of Appeals for the District of Columbia Circuit unanimously affirmed, reasoning (Pet. App. 31-32):

> It seems clear that at the time the Agreement was signed, the parties must have anticipated that the total amount of the supplies to be furnished would be in excess of $10,000, and subsequent events more than justified their expectations. Moreover, the Agreement itself specified the price of the items offered by appellant; these price quotations, in turn, presumably controlled in large part the amount appellant could afford to pay those of its employees who worked on

> Government orders. As far as appellant was concerned, the Purchase Notice Agreement itself, not the orders thereunder, was the document which primarily determined its wage and employment policies. Treating all of the orders as units or subcontracts under the Agreement, therefore, would conform to the realities of the business situation and, by looking to the document which affected appellant's labor practices, would effectuate the purposes of the Act. * * *

ARGUMENT

In holding that the Purchase Notice Agreement—under which petitioner made many hundreds of thousands of dollars of sales to the government—was a contract to which the fair labor provisions of the Walsh-Healey Act were applicable, the courts below applied settled principles of construction to reach a result that is in accord with both the language and the purpose of that Act. For that reason, and also because the issue involves primarily a particular kind of purchase agreement and, therefore, has limited importance, review by this Court is, in our view, not warranted.

1. The court of appeals correctly decided that the Purchase Notice Agreement is a "contract * * * for the * * * furnishing of * * * supplies * * * in any amount exceeding $10,000," within the meaning of Section 1 of the Walsh-Healey Act, 41 U.S.C. 35. The Agreement is clearly a "contract"; it creates enforceable rights and obligations on the part of both parties. It is also a "contract * * * for the * * * furnishing of * * * supplies," since it obligates petitioner to

furnish supplies as ordered by the government. Finally, it is a "contract * * * for the * * * furnishing of * * * supplies * * * in any amount exceeding $10,000," since petitioner is obligated to furnish supplies in amounts exceeding $10,000 at the government's option, and since as a practical matter sales far exceeding the $10,000 figure were expected and occurred.

Interpreting the Walsh-Healey Act to embrace the Purchase Notice Agreement accords with the purpose as well as the literal language of the Act. The Act was passed in order to prevent the natural desire of businessmen for sizable government purchases from inducing them to lower prices to a level preventing the maintenance of adequate labor standards. *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 128. Very sizable purchases, far in excess of the $10,000 minimum prescribed by the Act, were involved here; and though no individual order exceeded that amount, prices were established, not for the individual order, but for all the purchases of each product under the Agreement. Petitioner consequently had a substantial inducement to lower its prices (and hence its labor standards) to obtain the government's patronage—precisely the kind of situation in which the Act was meant to apply.[2] In terms of the Act's purpose,[3] then, it would

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[2] Under the Purchase Notice Agreement, the prices offered the government may not be higher than the prices offered other customers; but there is nothing prohibiting petitioner from offering the government lower prices than it offers the others (J.A. 18-19).

[3] As the court of appeals pointed out (Pet. App. 32), the $10,000 minimum was designed to enable small manufacturers

be totally unrealistic to view the Agreement, not as a single contract for the purchase of supplies, but as a series of discrete contracts. In addition, such a construction would be out of harmony with the language of the Agreement.[4]

It is irrelevant that the supplies here were not purchased through competitive bidding or negotiated procurement, where a special price is quoted to the government. The section of the Armed Services Procurement Act under which the Purchase Notice Agreement was negotiated specifically provides that, for purposes of applying the Walsh-Healey Act, purchases under the section shall be treated as if made after formal advertising for bids. 10 U.S.C. 2304(f). Consequently, the exception in the Walsh-Healey Act for open-market purchases (41 U.S.C. 43) is inapplicable.

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to obtain contracts and to avoid administrative burdens with respect to contracts so small they would be unlikely to have any significant impact upon wages or working conditions in an industry. *George* v. *Mitchell*, 282 F. 2d 486, 493 (C.A. D.C.). Involved here, as mentioned, were large purchases from a leading concern in the industry.

[4] The Walsh-Healey clause (J.A. 42; p. 3, *supra*) refers to the Agreement as "this contract," and provides that if "this contract" is for the manufacture or furnishing of materials, etc., "in an amount which exceeds *or may exceed* $10,000" (emphasis added), and if the Walsh-Healey Act is otherwise applicable, the Act's requirements apply. The clause plainly contemplates that, for purposes of applying the Act, the Agreement itself is the contract; and since, in addition, the Agreement contemplates purchases which might exceed $10,000, it seems clear that the Act was in fact intended by the parties to apply.

2. In *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 507, this Court, noting the requirement in Section 1 of the Walsh-Healey Act, 41 U.S.C. 35, that "there shall be included" in contracts covered by the Act the required representations and stipulations concerning labor standards, described the Act as applicable only to contractors who obtain government business "on terms of which they are fairly forewarned by inclusion in the contract." The Purchase Notice Agreement contained the government's standard Walsh-Healey clause, which provided that if "this contract" was subject to the Walsh-Healey Act, the required representations and stipulations would be treated as incorporated in it (J.A. 42, see n. 4, *supra*). Thus, the statutory requirement of inclusion was satisfied; we do not understand petitioner to contend otherwise.

The only other possible basis for a "forewarning" argument would be the Portal-to-Portal Act of 1947, 29 U.S.C. 251, 259, which establishes a defense to Walsh-Healey violations where good-faith reliance on administrative interpretation is shown. That defense was not available here, however, for the reliance must be upon an interpretation by the Secretary of Labor or the Administrator of the Public Contracts Division (29 U.S.C. 259(b); *United States* v. *Stocks Lincoln-Mercury, Inc.*, 307 F. 2d 266 (C.A. 10)), and the only administrative action alleged by petitioner as the basis for its contention that it was misled was by contracting officials of the Defense Department (Pet. 13-14). As a matter of fact, the Secretary of Labor and the Public Contracts Division have repeatedly

interpreted the Act to cover contracts like the Purchase Notice Agreement (Pet. App. 33, n. 8, 38), and since these administrative interpretations long predate the Agreement (which was executed in 1957),[5] we cannot agree that petitioner was not in fact adequately forewarned.

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[5] Shortly after passage of the Act, Secretary of Labor Perkins issued a set of Rulings and Interpretations which provided that "[a]ll contracts which may exceed $10,000 should include the stipulations required by the Act unless the contracting officer knows in advance that the total amount of the contract will not exceed $10,000 in any event." 2 F.R. 1634, 1636. This ruling (clearly applicable to the Purchase Notice Agreement) is still in effect. 2 CCH Lab. Rep. (Wages-Hours), ¶ 26,300.003. In addition, the Public Contracts Division and the Secretary of Labor have consistently ruled that the Act applies to contracts under which the government has the option to purchase over $10,000 but is not required to make purchases exceeding that amount. *Roger H. Pelham*, 6 Wage and Hour Cases 1228 (1947), affirmed, 7 Wage and Hour Cases 966 (1948); *Anderson and Cristofani*, 9 Wage and Hour Cases 86 (1949); *Euler Lime Co.*, 10 Wage and Hour Cases 176 (1951); *Norris, Inc.*, 10 Wage and Hour Cases 14 (1950).

The *amicus* brief of National Biscuit Company refers to a letter written in 1943 from the Deputy Administrator of the Public Contracts Division to National, giving the opinion that the "purchase notice agreement" which National then had with the War Department was not covered by the Walsh-Healey Act. The basis for the opinion was the War Department's advice that the agreement "is not regarded as a contract." The opinion (which was not published) does not give a ment, like that at issue here, imposed obligations on the complete statement of the terms of the agreement to which it referred, and in particular does not state whether the agreegovernment or included by reference the Walsh-Healey Act's requirements.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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